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No. 85-1633

In the Supreme Court of the United States

OCTOBER TERM, 1985

MERCHANTS NATIONAL BANK OF MOBILE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct in holding that the district court did not abuse its discretion in denying the first of petitioner's alternative motions for summary judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a; 85-1480 Pet. App. 1a-4a) is reported at 772 F.2d 1522. The order of the district court denying petitioner's first motion for summary judgment (R. 353) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a-11a; 85-1480 Pet. App. 10a-11a) was entered on October 7, 1985. On December 16, 1985, Justice Powell extended the time within which the United States might file a petition for a writ of certiorari to and including March 6, 1986. The government's petition was filed on that date (No. 85-1480). The cross-petition for a writ of certiorari was filed on April 4, 1986. See Sup. Ct. R. 19.5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On March 18, 1983, the United States brought this action in the United States District Court for the Southern District of Alabama against cross-petitioner, a bank with its principal place of business in Mobile, Alabama (Pet. App. 1a, 5a; R. 1-2). The government's complaint alleged that the bank, beginning in January 1977, had lent funds to Dri-Mix Products, Inc., under circumstances that rendered the bank personally liable, pursuant to Section 3505 of the Internal Revenue Code,[1] for a portion of Dri-Mix's unpaid withholding taxes. See 85-1480 Pet. 3-5. The government's complaint alleged that the bank's total liability under Section 3505 for the third and fourth quarters of 1977 was approximately $220,000, plus interest (R. 3-4).

On April 16, 1984, both sides moved for summary judgment (R. 314, 315). The government in its motion contended that the undisputed facts showed that the bank (1) had paid wages directly to the employees of Dri-Mix without withholding the requisite income and employment taxes and (2) had supplied funds to Dri-Mix for the specific purpose of paying wages with knowledge that Dri-Mix would not or would not be able to pay over the requisite withholding taxes, in consequence of which the bank had incurred personal liability under both Section 3505(a) and Section 3505(b). The bank in its motion (R. 315) contended that the undisputed facts showed that it had no liability under Section 3505; its brief in support of that motion set forth essentially the same theories as those that form the basis of the instant cross-petition. Compare Brief in Support of Defendant's Motion for Summary Judgment 12-19 with Pet. 10-15. On May 16, 1984, the district court, by order, denied both motions for summary judgment (R. 353) and directed the parties to prepare for trial.

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

On May 25, 1984, the bank amended its answer (R. 354) to assert as a new affirmative defense that the government was precluded from suing it because the government had not notified the bank of the tax assessments against Dri-Mix within the 60-day period specified in Section 6303(a). See 85-1480 Pet. 3-4. On May 30, 1984, the bank filed a second motion for summary judgment based on that theory (R. 358). The district court granted that motion the next day (Pet. App. 5a-9a). Upon the government's appeal, the Eleventh Circuit affirmed (*id.* at 1a-4a). We have filed a petition for a writ of certiorari to review the court of appeals' holding in that respect (No. 85-1480).

After prevailing on its second motion for summary judgment, the bank filed, on July 26, 1984, what it styled a "notice of cross-appeal" (R. 378) from the district court's order denying its first motion for summary judgment. The court of appeals considered the merits of the bank's cross-appeal and affirmed the district court (Pet. App. 3a-4a). The court of appeals noted the well-settled principles that "[t]he decision to *deny* a summary judgment * * * is discretionary with a trial court" and that an order denying summary judgment is reviewable "only for an abuse of discretion" (*id.* at 4a (emphasis in original)). The court of appeals recited that "[c]ounsel for [the bank] all but conceded at oral argument * * * that [the cross-appeal was] without merit" (*id.* at 3a). The court of appeals agreed with that assessment and "conclude[d] that the district court did not err in denying [the bank's] first motion for summary judgment" (*id.* at 4a).

ARGUMENT

1. The bank's cross-petition is confronted at the outset with procedural and jurisdictional problems. In fact, there was no basis for the bank's "cross-appeal" to the Eleventh Circuit. This Court has made it clear that a successful party may not appeal where he does not seek to alter the judgment in his favor. *E.g., Deposit Guaranty Nat'l Bank* v. *Roper*,

445 U.S. 326, 333 (1980); *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939). Since the district court granted the bank's second motion for summary judgment, and since the bank thereby received the same judgment and the same relief (albeit on a different theory) that it would have received had the district court granted its first motion for summary judgment, the bank was in no position to appeal. Even if the bank had been in a position to appeal, an order denying summary judgment is not an appealable "final decision[]" for purposes of 28 U.S.C. 1291. See 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2715, at 636-638 (1983); 15 *id.* § 3914, at 587-588 (1976). Obviously, if the district court had denied the bank's second, as well as its first, motion for summary judgment, the bank could not have appealed either order, but would have had to proceed to trial on the merits. The bank was put in no better position to appeal the denial of its first motion by the circumstance that its second was granted.[2] There was thus no basis for the bank's cross-appeal to the Eleventh Circuit and hence none for its cross-petition to this Court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 2.4, at 46 (6th ed. 1986).

2. In any event, the bank's cross-petition is wholly without merit. The only question presented by the cross-petition is whether the district court abused its discretion in denying the bank's first motion for summary judgment. The court of appeals correctly answered that question in the negative. A Rule 56 motion may be denied where there exist genuine issues of material fact that preclude summary judgment or where the district court, in the "sound exercise of judicial

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[2]Of course, a party may, without cross-appeal or cross-petition, defend a judgment in his favor on any ground properly urged below. See, *e.g.*, *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.35 (6th ed. 1986).

discretion," decides " 'to give the parties an opportunity to fully develop the case.' " Pet. App. 4a (quoting *Marcus* v. *St. Paul Fire & Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981)); Fed. R. Civ. P. 56(c). As to each of the theories that underlay the bank's first motion for summary judgment and that form the basis for its cross-petition, the district court's action was proper.

a. The bank first contends (Pet. 10-12) that it was entitled to summary judgment on the theory that the government was barred from suit by its failure to raise its Section 3505 claim as a "compulsory counterclaim" in a pending congressional reference case involving the bank. See 28 U.S.C. 1492 and 2509. In 1979, a private relief bill was introduced in the Senate proposing that the bank be paid $809,609 in settlement of certain claims against the United States (S. 2052, 96th Cong., 1st Sess. (1979)). These claims arose out of the cancellation by the Defense Logistics Agency, a branch of the Defense Department, of a guarantee of a so-called "V-loan" made by the bank to Dri-Mix. A "V-loan" is a method of financing government contracts whereby the government guarantees a loan from a lender to a defense contractor; in this instance, Dri-Mix had entered into a contract to package C-rations for the Defense Department (Kanehl Dep. 7-12, 20; Patrick Dep. 39-44, 47-48). On September 24, 1980, the Senate agreed to S. Res. 291, 96th Cong., 1st Sess. (1979), which referred the bill to the Chief Commissioner of the Court of Claims as a "congressional reference case" pursuant to 28 U.S.C. 1492 and 2509. The resolution asked for a report "sufficient to inform the Congress of the nature and character of the demand of the claim, legal or equitable, against the United States, or a gratuity in the amount, if any, legally or equitably due from the United States to the claimant." 126 Cong. Rec. 27044 (1980). See S. Rep. 96-961, 96th Cong., 2d Sess. (1980).

On April 30, 1984, the hearing officer of the Claims Court[3] issued his report and opinion, concluding that the bank had an equitable claim, but no legal claim, against the United States, and recommending that S. 2052 be passed. *Merchants Nat'l Bank of Mobile* v. *United States*, 5 Cl. Ct. 180 (1984). On December 6, 1984, the review panel of the Claims Court agreed with the hearing officer's report, concluding: "The Merchants National Bank of Mobile does not have a legal claim against the government, but does have an equitable claim against the government for $809,609, and * * * the payment of said sum to plaintiff would not constitute a gratuity." *Merchants Nat'l Bank of Mobile* v. *United States*, 7 Cl. Ct. 1, 13 (1984). Subsequently, new private relief bills were introduced in Congress proposing that the bank be paid $809,609. S. 593, 99th Cong., 1st Sess. (1985); H.R. 1527, 99th Cong., 1st Sess. (1985). The Senate passed S. 593 on December 6, 1985 (131 Cong. Rec. S17124-S17126 (daily ed.)). The House has not yet acted.

The bank's argument that the government should have raised its claim under Section 3505 for Dri-Mix's unpaid withholding taxes as a "compulsory counterclaim" in the congressional reference case is little short of frivolous. A "congressional reference case" pursuant to 28 U.S.C. 1492 and 2509 is not a judicial proceeding. Rather, it is a statutory procedure used to assist Congress in considering bills for private relief that require the resolution of complex issues of fact. Instead of holding lengthy hearings on such bills, Congress often refers them to the Claims Court for a report on the facts and a recommendation as to whether

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[3]The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Tit. I, §§ 133(b), 139(h), 96 Stat. 40, 42, amended 28 U.S.C. 1492 and 2509, effective October 1, 1982, to provide that congressional reference cases are to be referred to the Chief Judge of the new Claims Court, rather than to the Chief Commissioner of the old Court of Claims.

relief should be granted. The report of the Claims Court "is wholly advisory, and the power to grant legislative grace by passing the relief bill remains solely in the hands of Congress." S. Rep. 1643, 89th Cong., 2d Sess. 4 (1966).

Since a congressional reference case is not a judicial proceeding, it follows that the concept of compulsory counterclaims has no application in such a case. The bank cites no authority in support of its novel contention,[4] and we are aware of none. A report in a congressional reference case is not a final judgment in a judicial proceeding, but is merely a recommendation to Congress, and as such it can have no res judicata or collateral estoppel effect. See *Rawlins* v. *United States*, 686 F.2d 903, 906 (Ct. Cl. 1982) ("[T]he findings and conclusions of the review panel [in a congressional reference case] have no collateral estoppel effect" because "the determinations of the panel do not result in a final judgment."). Because the rule that failure to assert a compulsory counterclaim bars its later assertion is based on res judicata principles (see generally 3 J. Moore, *Moore's Federal Practice* ¶ 13.12[1], at 13-52 (2d ed. 1985)), the government was not barred from bringing this action against the bank under Section 3505 by virtue of the congressional reference.

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[4]The bank erroneously implies (Pet. 10 & n.4) that Rule 13(a) of the Claims Court's Rules, a general rule governing litigation in that court, requires the assertion of compulsory counterclaims in congressional reference cases. The Claims Court's rules governing congressional reference cases, however, specifically provide that the Court's general rules apply to such cases only "to the extent feasible." Rules of the United States Claims Court, App. D ("Procedure in Congressional Reference Cases"). Given the nonjudicial nature of congressional reference cases, application of the general rule governing compulsory counterclaims is obviously not "feasible." See generally Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 Am. U. L. Rev. 595, 616-617 (1976).

b. The bank likewise errs in its alternative contention (Pet. 12-15) that it was entitled to summary judgment on the theory that the Treasury Regulations immunize it from Section 3505 liability as a matter of law. The Regulation that the bank cites (Pet. 12-13) to counter the government's allegations under Section 3505(a) states that a bank "acting only in the capacity of a disbursing agent of [the employer's] funds, would incur no liability" (Treas. Reg. § 31.3505-1(c)(2) (Example 2)). The government's complaint alleged, however, that the bank was not "acting only in the capacity of a disbursing agent" of Dri-Mix's funds; there was evidence to show that Dri-Mix had no funds, and that the bank prepared the net payroll checks and supplied all the funds for the payment of wages (R. 89, 147; Patrick Dep. 78-82, 93, 106; Kanehl Dep. 37; Browning Dep. 16-18). Under these circumstances, a court could properly find that the bank had "pa[id] wages directly to [the] employees" of Dri-Mix, thereby incurring personal liability under Section 3505(a). See *United States* v. *Kennedy Construction Co.*, 572 F.2d 492, 494-495 (5th Cir. 1978); *United States* v. *Clayton-Kent Builders, Inc.*, 378 F. Supp. 1109, 1113-1114 (M.D. La. 1974), aff'd mem., 510 F.2d 1406 (5th Cir. 1975) (Table). The district court did not abuse its discretion in concluding that there existed disputed issues of material fact precluding the grant of summary judgment for the bank on the question of its liability under Section 3505(a).

Also without merit is the bank's argument (Pet. 13-15) that it was entitled to summary judgment on the question of its liability under Section 3505(b). The bank on that score relies on Treas. Reg. § 31.3505-1(b)(3), which states that Section 3505(b) does not apply "in the case of an ordinary working capital loan made to an employer, even though the person supplying the funds knows that part of the funds advanced may be used to make wage payments in the ordinary course of business." But the bank ignores the remainder of that Regulation, which states:

> However, section 3505(b) is applicable where the person supplying the funds has actual notice or knowledge (within the meaning of section 6323(i)(l)) at the time of the advance that the funds, or a portion thereof, are to be used specifically to pay net wages, whether or not the written agreement under which the funds are advanced states a different purpose. Whether or not a lender has actual notice or knowledge that the funds are to be used to pay net wages, or merely that the funds may be so used, depends upon the facts and circumstances of each case.

Thus, even where a lender makes an "ordinary working capital loan," its lending arrangment can bring it within the scope of Section 3505(b) if it has the requisite knowledge. In the instant case, there was evidence that the bank approved each overdraft check for payroll, knew that the checks approved were payroll checks, and knew that Dri-Mix had no funds with which to pay the requisite withholding taxes other than funds supplied by the bank (R. 91, 151; Patrick Dep. 47-48, 63-64, 76-82, 93, 95-96, 100-106; Kanehl Dep. 37). Since the bank was essentially in control of every phase of Dri-Mix's finances at this time, there was at the very least a genuine issue whether the bank had "actual notice or knowledge" (I.R.C. § 3505(b)) that the taxes were not being paid. Indeed, courts routinely have found lenders liable under Section 3505(b) on similar facts. See *Fidelity Bank, N.A.* v. *United States*, 616 F.2d 1181, 1184-1185 (10th Cir. 1980); *United States* v. *Park Cities Bank & Trust Co.*, 481 F.2d 738, 740-741 (5th Cir. 1973).

CONCLUSION

The cross-petition for a writ of certiorari should be dismissed for want of jurisdiction or, in the alternative, should be denied.

Respectfully submitted.

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